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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRITNI KAY KUHFELD, Appellant.	2 CA-CR 2008-0175 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071917

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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E S P I N O S A, Judge.

¶1 Following a jury trial, Britni Kuhfeld was found guilty of transporting two pounds or more of marijuana for sale and possession of drug paraphernalia and sentenced to concurrent, substantially mitigated prison terms of three years and .33 years respectively. She appeals her convictions, arguing the trial court erred in instructing the jury on deliberate ignorance. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to sustaining the jury's verdicts. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In April 2007, Kuhfeld's coworker offered her over $800 to drive from Chandler to Ajo in a convoy to pick up packages from Mexico. Kuhfeld testified she had believed she would be picking up packages of fruit, and, although she had "never heard of illegal fruit trafficking," she was aware she was "doing something wrong." On the day she was arrested, she drove to the appointed mile marker, yelled the pre-determined password, and several men appeared from behind trees and loaded 276.5 pounds of "rank . . . potent smell[ing]," cellophane-wrapped marijuana into her car.

¶3 After her car was loaded, Kuhfeld pulled into a gas station and put $5 worth of gas into her tank, which was almost full, as her coworker and another man had instructed her to do. Pima County Sheriff's Deputy Christian Gibson saw her at the gas station and stopped her shortly after she re-entered the highway because her trunk was open, which was a safety hazard. As Gibson approached Kuhfeld's car, he smelled marijuana and saw the packages in the back seat. He placed Kuhfeld under arrest.

¶4 At trial, Kuhfeld maintained she was unaware she had been hired to transport marijuana and did not know the packages contained marijuana rather than fruit until she was arrested. Over Kuhfeld's objection, the trial court granted the state's request for an instruction on deliberate ignorance. The jury was instructed as follows:

> "Knowingly" means with respect to conduct or to a circumstance described by a statute defining an offense; that person is aware or believes that his or her conduct is of that nature, or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.
>
> Knowledge can be established by direct or circumstantial evidence. It can be established by showing that the defendant was aware of the high probability that the packages contained marijuana, and that she acted with a conscious purpose to avoid learning the true contents of the packages.
>
> The crime of transporting marijuana for sale requires proof that, one, the defendant knowingly transported marijuana for sale; and, two, the substance was, in fact, marijuana.

Discussion

¶5 Section 13-3405(A) required the state to prove Kuhfeld had knowledge of the marijuana. Kuhfeld contends the trial court erred by instructing the jury on "willful ignorance," arguing the evidence at trial did not support the instruction and "unconstitutionally lowered the state's burden of proof." A party is entitled to a jury instruction on any theory reasonably supported by the evidence. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). We review de novo whether jury instructions accurately state the law. *State v. Bocharski*, 218 Ariz. 476, ¶ 47, 189 P.3d 403, 414 (2008). In making this determination, we view the instructions in their entirety. *State v. Cox*, 217

Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). "If a jury would be misled by the instructions when taken as a whole, the trial court has committed reversible error. If, on the other hand, the instructions as a whole are 'substantially free from error,' [we will] affirm the conviction[]." *Id., quoting State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968); *see also State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003) (error in jury instructions subject to harmless error review).

¶6 Kuhfeld argues that because the "state's only evidence was a strong odor of marijuana" and she had testified she was unfamiliar with the smell of marijuana, "there was no evidence to support the deliberate ignorance instruction." As the state correctly points out, however, the jury is free to disbelieve a witness's testimony in whole or part. *See State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). The state presented ample evidence to support the inference that Kuhfeld either knew the packages contained marijuana or the circumstances were such that her ignorance of it had been willful. And, even if the jury credited her testimony that she was unfamiliar with the smell of marijuana, the state presented evidence that she had agreed to accept over $800 to drive her car as part of a convoy at night to a specified mile marker, relay a password, and receive a delivery from unknown persons. She also admitted she believed she was doing something "wrong," but chose not to ask questions. Finally, the evidence showed the packages placed in her car did not smell or look like they contained fruit, but did have a strong odor. Based on this evidence, a reasonable juror could infer that if Kuhfeld did not know what was in the packages, the circumstances were such that she was aware there was a high probability the

packages contained marijuana, but deliberately avoided learning the truth. Thus, the instruction was supported by the evidence.

¶7 Kuhfeld next contends the jury instruction "unconstitutionally lower[ed] the state's burden of proof," creating a risk the jury could convict her for "mere negligence." In our recent opinion in *State v. Fierro*, however, we expressly approved of an identical instruction in a similar case, holding it "accurately stated the law . . . [and] properly informed the jury that [a defendant's claim] that he [or she] lacked the requisite knowledge for the commission of the offense entailed a credibility determination for the jury to make." No. 2 CA-CR 2007-0369, ¶¶ 6-9, 2008 WL 5340166 (Ariz. Ct. App. Dec. 22, 2008). We therefore find no error in the instruction given.

Disposition

¶8 For the reasons stated above, Kuhfeld's convictions are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge